15th Avenue Iron Works, Inc. *and* Shopmen's Local Union Number 455 of the International Association of Bridge, Structural and Ornamental Iron Workers, AFL–CIO. Case 29–CA–13601

February 27, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND DEVANEY

On March 27, 1989, Administrative Law Judge Eleanor MacDonald issued the attached decision. The General Counsel filed exceptions and a supporting brief and the Respondent filed cross-exceptions and a brief in support of the judge's decision and an answering brief to the General Counsel's exceptions.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order.[3]

The judge found, in part, that all the Respondent's failures to make timely fringe benefit fund contributions in accord with the parties' collective-bargaining agreement should be deferred to the arbitration process specified in that agreement, citing the arbitral awards placed in evidence and relying on *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), and *Olin Corp.*, 268 NLRB 573 (1984). The General Counsel contends that the judge erred by deferring allegations regarding the Respondent's failures to make fringe benefit contributions to arbitration and by failing to find that the Respondent's failures to make the fund contributions violated Section 8(a)(5) and (1).

We disagree with the judge's decision to the extent that it provides for deferral of the Respondent's undisputed failures to make fringe benefit fund contributions for periods for which no arbitral awards have issued. Accordingly, we find that the Respondent's failure to make those timely fringe benefit fund contributions not covered by the arbitral awards violates Section 8(a)(5) and (1) and shall order the Respondent to take appropriate remedial action.

The facts set forth in the judge's decision and in the record show that under the parties' collective-bargaining agreement, which expired June 30, 1988, the Respondent was obligated to make monthly fringe benefit fund payments for its employees.[4] The agreement specifically provided that failure by the Respondent to make payments in full by the 10th day of the month following the month for which contributions were due constituted a breach. In addition, the collective-bargaining agreement provided for special arbitration by a single arbitrator of disputes arising from the Respondent's failure to make timely payments to the fringe benefit funds.[5]

The complaint alleges, in part, that the Respondent has violated Section 8(a)(5) and (1) by failing to make fringe benefit fund contributions since on or about December 30, 1987,[6] as required by the collective-bargaining agreement, and by engaging in unilateral conduct since June 30, 1988 (the expiration date of the collective-bargaining agreement) by its failure to make such fringe benefit fund contributions. The Respondent's answer summarily denied these complaint allegations. At the commencement of the hearing, the Respondent's attorney asserted that the failure to make fringe benefit fund contributions was an arbitrable issue.[7] It is undisputed that the Respondent failed to make timely fringe benefit fund payments for the last 7 months of 1987 and for at least the first 9 months of 1988.[8] During the course of the hearing, the General Counsel introduced into the record five arbitral awards covering the Respondent's failure to make fringe benefit fund contributions, three of which covered contributions for periods prior to those specified in the complaint allegations (and which are therefore not before us) and two of which addressed delinquencies included in the complaint; i.e., payments which were due for February, March, and May 1988. In its brief to the judge, the Respondent argued that the pertinent issue

[1] The Respondent states that an out-of-Board settlement has been reached that covers the General Counsel's exceptions. No evidence has been presented to support that statement nor has the General Counsel withdrawn his exceptions. Consequently, we find no reason to suspend our review.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] The Respondent has excepted to the judge's finding that the bargaining unit included installers, noting that the complaint described the bargaining unit as excluding installers. The Respondent, however, denied the description of the bargaining unit in its answer. Thus the scope of the bargaining unit became an issue at the hearing. We find that the testimony given at the hearing supports the judge's determination that the bargaining unit includes installers, consistent with the underlying Board certification and the bargaining history of the parties.

In agreeing with the judge that the Respondent unlawfully denied access to its facility to union representatives, we rely on the fact that the Respondent's announcement that it did not want the union representatives on the premises ever again was stated unconditionally.

[4] As fully described in the judge's decision, these fringe benefit funds included a vacation fund, welfare fund, apprenticeship fund, annuity fund, severance pay fund, pension fund, and sick leave fund.

[5] This is distinct from provisions in the collective-bargaining agreement for grievance and arbitration machinery for disputes arising under the contract that do not involve fringe benefit fund contributions.

[6] This date is 6 months prior to the date the unfair labor practice charge filed in this proceeding was served on the parties, June 30, 1988.

[7] In the opening remarks of the Respondent's attorney, it appears that the reference to the fund payments being an arbitrable issue was primarily intended to dispute the General Counsel's additional complaint allegation that the Respondent had repudiated the collective-bargaining agreement by its failure to make these payments.

[8] The Respondent eventually made fringe benefit fund payments for May through September 1987 and January 1988.

regarding its failure to make fringe benefit fund contributions was whether the complaint allegations in this matter should be ''dismissed on the basis of the Board's standard for deferral in *Spielberg Manufacturing Co*., 112 NLRB 1080, and *Olin Corp*., 268 NLRB [573],'' and that ''all allegations for failure to make required contributions . . . were resolved voluntarily by the parties' utilization and participation in the grievance and arbitration process.''

The judge properly held that the Board should withhold its process and defer to the arbitral awards already made because the Respondent's breach and the alleged 8(a)(5) and (1) violation are factually parallel to those at issue in the arbitral proceeding, there has been no showing that the arbitrator was not ''presented generally with facts relevant to resolving the unfair labor practice,''[9] and the arbitrator's award is not ''palpably wrong.''[10] We thus reject the General Counsel's contention that it is inappropriate to defer to the existing arbitral awards regarding the Respondent's failures to make fringe benefit fund contributions.[11]

It is inappropriate, however, to defer when no arbitral awards have issued and the Respondent has not sought deferral[12] in view of the Board's long-held view that it will not defer to prospective arbitration unless the argument for deferral is asserted before or during an unfair labor practice hearing.[13] Moreover, even if the Respondent had timely sought deferral to the parties' contractual grievance and arbitration procedures, we would find deferral inappropriate with respect to benefit fund deliquencies arising after the expiration of the collective-bargaining agreement on June 30, 1988.[14] In *Indiana & Michigan Electric Co*., 284 NLRB 53 (1987), the Board interpreted *Nolde Bros. v. Bakery Workers Local 358*, 430 U.S. 243 (1977), and held that a party's presumptive contractual duty to arbitrate grievances about postexpiration events or conduct extends only to rights that ''arise under'' the contract because they are ''capable of accruing or vesting to some degree during the life of the contract and ripening or remaining enforceable after the contract expires.'' 284 NLRB at 60. Even though the Respondent's failure to make timely fund payments has been a continuing problem that began during the term of the contract, the failure to make fund payments for months since that contract expired is not presumptively arbitrable under the rationale of *Indiana & Michigan*. This is so because the Union's right to payment for those particular months did not accrue or vest until after the contract expired.

Accordingly, even under a properly raised request for deferral under *Collyer*, only the pre-July 1988 delinquencies not yet resolved by arbitral awards could be addressed by prospective arbitration, and the Board would still be required to resolve the allegations involving the Respondent's subsequent delinquencies. As noted above, under *George Koch*, the Board will not defer for prospective arbitration only a portion of the intertwined issues in unfair labor practice proceedings.

As the record in this proceeding indicates that the Respondent does not dispute that it had an obligation to make the fringe benefit fund contributions now at issue in this proceeding, but has defended its failure to pay solely on the basis that it was not economically

[9] *Olin Corp*., 268 NLRB at 574.

[10] Id.

[11] We reject the General Counsel's contention that deferral is inappropriate because of Board policy to resolve an entire dispute in a single proceeding. The case cited by the General Counsel, *Sheet Metal Workers Local 17 (George Koch Sons)*, 199 NLRB 166, 168 (1972), is inapposite to the issue presented in the instant proceeding insofar as it is governed by *Spielberg* and *Olin*. In *George Koch*, the Board held that it would not defer to pending arbitration proceedings under *Collyer Insulated Wire*, 192 NLRB 837 (1971), in a situation where the pending arbitration proceeding would not resolve all issues before the Board. In the instant case, the arbitration proceedings, to which deferral has been requested, have been completed and deferral to these proceedings would not preclude the Board from now resolving all remaining issues presented to the Board. Cf. *Toyota of San Francisco*, 280 NLRB 784 (1986). The fundamental distinction underlying the Board's willingness to consider partial deferral under *Spielberg* criteria is that no further delay in resolving the proceeding before the Board is thereby necessary, whereas were the Board to consider deferral under *Collyer* to prospective arbitration for some of the intertwined issues in a proceeding before the Board, the result would necessarily entail further delay in reaching a final decision on those issues.

We further find no merit in the General Counsel's reliance on the failure of the Respondent to comply with the existing arbitration awards. Under *Malrite of Wisconsin*, 198 NLRB 241 (1972), enfd. in relevant part 494 F.2d 1136 (D.C. Cir. 1974), noncompliance with an arbitral award is not ''a matter for the Board's concern.'' The General Counsel attempts to distinguish this case from *Malrite* on the ground that the Respondent's failure to comply with several arbitration awards constituted a repudiation of the contract, citing *Electronic Reproduction Service Corp*., 213 NLRB 758 (1974), as authority supporting that distinction. In that case, however, the refusal to execute a contract pursuant to an arbitrator's award struck at the very essence of the collective-bargaining relationship. Id. at 759, fn. 2. By not signing the contract, the Respondent in effect repudiated that relationship. Hence, the bargaining process itself was at stake and deferral to the award would not protect or enhance it. We are not faced with that situation here. The Respondent does not deny its obligations under the contract but claims a lack of funds to meet them. Further, the Respondent's noncompliance relates to arbitral awards all stemming from the breach (albeit repeated) of the same contractual provisions. In that respect, it is not dissimilar from *Malrite*, which involved the breach of a single contractual provision in the form of a unilateral change in a term and condition of employment that the respondent continued uninterrupted in the face of an adverse arbitration decision and award.

[12] As noted above, the Respondent did mention at the hearing that the issues were arbitrable, but in so doing only referred to the existing arbitration awards. Its posthearing brief makes it evident that the Respondent sought to rely only on those arbitral awards previously made regarding the Respondent's fund contribution delinquencies. We reach this conclusion because the Respondent's brief cites only the Board's standards for deferral in *Spielberg Mfg. Co*., supra, and *Olin*, supra, in arguing for deferral in regard to its failure to make fund contributions, but cites *Collyer Insulated Wire*, supra, and *United Technologies Corp*., 268 NLRB 557 (1984), in arguing deferral regarding a separate 8(a)(5) and (1) allegation concerning the Respondent's denial of access to its facility for union representatives; this issue, like the fund payment issue, involved a provision in the collective-bargaining agreement. Thus, it is apparent that the Respondent is aware that the Board has different standards for granting deferral based on whether the issues involve arbitral awards or prospective arbitration, and that the Respondent knowingly did not request *Collyer* deferral on the allegations of the delinquent fringe benefit fund contributions which had not been taken to arbitration.

[13] *MacDonald Engineering Co*., 202 NLRB 748 (1973); *Alameda County Assn*., 255 NLRB 603, 605 (1981).

[14] Member Cracraft does not rely on this basis in reversing the judge's deferral to arbitration of those claims which were not arbitrated and for which the Respondent has not sought deferral.

able to do so,[15] we find merit in the General Counsel's contentions that the Respondent has violated Section 8(a)(5) and (1) by its failure to make these fringe benefit fund contributions.[16]

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 5.

''5. By failing and refusing for certain periods after December 30, 1987, to make fringe benefit fund contributions as required by the terms of its collective-bargaining agreement with the Union, and by unilaterally changing such terms upon the expiration of the collective-bargaining agreement, the Respondent violated Section 8(a)(5) and (1) of the Act.''

ORDER

The Respondent, 15th Avenue Iron Works, Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Denying union representatives access to the shop pursuant to the collective-bargaining agreement.

(b) Threatening union agents with bodily harm and threatening to close its facility if the employees exercise their right to strike under the collective-bargaining agreement.

(c) For certain periods after December 30, 1987, failing to abide by the terms of the collective-bargaining agreement pertaining to its contributions to funds for vacation; welfare; apprenticeship, training-upgrading trust; annuity (supplemental retirement); severance pay trust; pension; and sick leave, and by unilaterally changing such terms upon the expiration of the collective-bargaining agreement.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Pay the contractually agreed-on contributions to the funds described above, for which no arbitral awards are on record, in the amounts of the contributions that the Respondent failed to make on behalf of the unit employees since December 30, 1987, in accord with the Board's decision in *Fox Painting Co.*, 263 NLRB 437 (1982), with any additional amounts applicable to such payments to be computed in accordance with the Board's decision in *Merryweather Optical Co.*, 240 NLRB 1213 (1979). The Respondent shall reimburse its employees for any expenses they incur as a result of its failure to make these fund payments in the manner set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981). Interest shall be computed in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(b) Preserve and, on request, make available to the Board or its agents for examination and copying all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount due under the terms of this Order.

(c) Post at its facility at 1676 61st Street, Brooklyn, New York, copies of the attached notice marked ''Appendix.''[17] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[15] It is well established that inability to pay obligations negotiated in a collective-bargaining agreement is not recognized as a defense to an employer's failure to fulfill those obligations. See *Raymond Prats Sheet Metal Co.*, 285 NLRB 194 (1987).

[16] As indicated above, the delinquencies for which unfair labor practices are now found include contributions for December 1987, January 1988 (for which the contributions were belatedly made), April 1988, and for the months following May 1988.

[17] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse access to the shop to your union representatives pursuant to the collective-bargaining agreement.

WE WILL NOT threaten your union representatives with bodily harm.

WE WILL NOT threaten to close the facility if you exercise your right to strike pursuant to the collective-bargaining agreement.

WE WILL NOT fail and refuse to make fringe benefit fund contributions as required by the terms of our collective-bargaining agreement with the Union, or unilaterally change such terms on the expiration of the collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make whole the employees who have incurred losses because of our failure to make fringe benefit fund contributions, and WE WILL pay the contractually agreed-on fringe benefit funds in the amounts of the contributions that we failed to make on behalf of our employees. WE WILL reimburse our employees for any expenses resulting from our failure to make the required payments. The computations of the monetary amounts and appropriate interest thereon will be made in accordance with applicable decisions of the National Labor Relations Board.

15TH AVENUE IRON WORKS, INC.

April M. Wexler, Esq., for the General Counsel.
Chuck Ellman (Industrial Labor Relations Consultants), of East Orange, New Jersey, for the Respondent.
Vicki L. Erenstein, Esq. (Siser, Weinstock, Harper, Dorn & Leibowitz), of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ELEANOR MACDONALD, Administrative Law Judge. This case was tried in Brooklyn, New York, on October 31 and November 1, 1988. The complaint alleges that Respondent, in violation of Section 8(a)(1) and (5) of the Act, denied union agents access to Respondent's facility, threatened union agents with bodily harm, threatened to close Respondent's facility, and failed to make contributions to certain funds as required by the applicable collective-bargaining agreement. Respondent denies the material allegations of the complaint.

On the entire record, including my observations of the demeanor of the witnesses, and after due consideration of the briefs filed by General Counsel and Respondent in January 1989, I make the following[1]

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New York corporation engaged in the manufacture and installation of staircases, railings, window guards, and related iron products, annually receives goods valued in excess of $50,000 directly in interstate commerce. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Credibility of the Witnesses*

Hernan Ovillo Rivara testified on behalf of Respondent. Rivara is an employee of Respondent and it was obvious to me that he felt personal loyalty to his employer, Steve Degliuomini, president of Respondent. While he was giving his testimony, Rivara constantly looked at his employer and smiled at him. Rivara answered the questions posed to him on behalf of Respondent with cooperation and in a forthright manner. However, on cross-examination by counsel for General Counsel and counsel for the Charging Party, Rivara was often unresponsive and evaded the questions. I formed the impression from observing Rivara that he was prepared to tell one story and that he resisted exploring any facts that might be unfavorable to Respondent. Furthermore, Rivara testified through an interpreter and it was clear that he did not have a complete understanding of the English language. Therefore, Rivara's testimony about conversations and exchanges that took place in English are not reliable since he might easily have missed many important words and sentences that were spoken in English. I shall not credit Rivara's testimony where it is contradicted by other more credible testimony.

William Colavito, president of the Union, testified in a forthright and cooperative manner. He was not evasive on cross-examination. I shall credit his testimony.

Anthony Rosaci, a member of the executive board of the Union, testified in a careful, thoughtful manner. I shall credit his testimony. Frank Hernandez, secretary-treasurer of the Union, testified in a credible manner. Both of these witnesses were cooperative and answered fully on cross-examination. I shall rely on their testimony.

Steve Degliuomini testified on behalf of Respondent. His testimony about the financial condition of Respondent was vague and incomplete. As to the other matters at issue here, his testimony was contradicted by the testimony of Hernandez and Rosaci, whom I have found to be credible witnesses. I shall not credit the testimony of Degliuomini where it is contradicted by other more reliable evidence.

[1] The record is corrected so that at p. 14, LL. 15 and 16, it reads in conformity with the testimony: ''We agreed the employees that were doing that work on the outside would be included in the bargaining units.''

B. *The Arrears in Fund Contributions*

The Union is the certified representative of Respondent's employees pursuant to an election held in 1982. The unit stipulated by the parties in that proceeding was:[2]

> All full-time and regular part-time production and maintenance employees including installer employees employed at the Employer's 1676 61st Street, Brooklyn, New York facility, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

The collective-bargaining agreement between the parties was signed January 5, 1987. William Colavito, the president of the Union, testified that the parties adopted the Standard Independent Contract for the industry, including the standard definition of the unit. This definition includes production and maintenance employees, but by its terms excludes erection and installation employees. The standard language is compelled by the fact that most of the other locals in the International represent units composed solely of installers and they wish to protect their jurisdiction. Local 455, however, represents small shops where the work force must be flexible. Colavito stated that the International understands that, in practice, Local 455 represents shops including installers and the International has never objected to the situation. Colavito testified that, although the language of the collective-bargaining agreement excludes installers, the Respondent and the Union have interpreted their agreement to include Respondent's installer employees.

The collective-bargaining agreement between Respondent and the Union has a term from January 1, 1985, through June 30, 1988. It provides for employer contributions to the Local 455 Industry Vacation Fund, the Iron Workers Local 455 Welfare Fund, the Local 455 Apprenticeship, Training-Upgrading Trust Fund, the Iron Workers Local 455 Annuity (Supplemental-Retirement) Fund, the Local 455 Severance Pay Trust Fund, the Pension Fund for Iron Workers Local 455, and the Iron Workers Local 455 Sick Leave Fund.[3]

The collective-bargaining agreement provides that failure of Respondent to make payments in full to the funds by the 10th day of each month following the month in which the contributions are due constitutes a breach. On 10 days' ''written notice to the Company, the Union . . . shall have the right at any time or times thereafter to strike and remove its members from the plant . . . until the company pays the full amount of all monies then due . . . and also pays the employees who are on strike their regular rate of pay. . . . Once a Company has received such a . . . notice, the right of the Union to withdraw its members . . . continues for all subsequent delinquencies without requiring that any further notice be given.''

It is undisputed that Respondent is substantially in arrears with respect to making contributions to the various funds as required by the collective-bargaining agreement between Respondent and the Union. At the time of the hearing, Respondent had not made the required contributions for the months of October, November, and December 1987. Further, for the year 1988, Respondent had only contributed to the funds for the month of January. None of the payments that have been made were made timely according to the terms of the collective-bargaining agreement. In addition, a number of arbitrations have been conducted between the Union and Respondent relating to Respondent's failure to make contributions to the funds; all of these five arbitrations, held between October 1987 and July 1988, have resulted in arbitrators' awards ordering Respondent to make its contributions to the funds. On March 14, 1988, Respondent's president signed a confession of judgment with respect to the arrears owing to the various funds. In the summer of 1988, the Union levied on Respondent's bank account twice for payment of a portion of the money owed to the funds.

On November 14, 1987, the Union sent Respondent the 10-day notice pursuant to the contract provision described above, stating the Respondent was delinquent in its payments to the various funds named in the collective-bargaining agreement. The notice stated, inter alia, that unless Respondent paid the sums due within 10 days, the Union ''will invoke the provisions of the trust Fund Protection section of the Agreement, and without further notice, strike your Company.'' I am satisfied from the two postal receipts accompanying the Union's copy of the notice that it was delivered by the Postal Service to Respondent's premises on November 17, 1987.

Steve Degliuomini testified that Respondent has had difficulty collecting payments from customers, that Respondent is involved in a number of lawsuits regarding money owed to it and which it owes to other entities, and that Respondent owes money to suppliers and others. Further, Degliuomini testified that Respondent has cashflow problems and that business is slow. Respondent has also made substantial payments to discriminatees as a result of a prior Board proceeding. I note that Respondent offered no financial statements into evidence. Thus, there is no evidence in the record to establish Respondent's actual overall financial condition; Respondent has merely shown that it owes money and that others owe money to it.

Respondent's position regarding the fund payments is that whenever it has the cash to pay the funds it will do so. Respondent points out that it has never denied its obligations under the collective-bargaining agreement nor has it refused to participate in the arbitrations held to adjudicate its arrears in payments to the funds.

C. *Alleged Denial of Access and Threats*

The collective-bargaining agreement contains a ''Plant Visitation'' clause which provides as follows:

> Business Agents and/or other authorized representatives of the Union shall be permitted to enter the shop of any Company . . . without undue delay, at any time during which any employees are working for the purpose of investigating complaints and/or working conditions.

Colavito testified in response to questions posed by Respondent that he has never been denied access to the shop to speak to the employees. When negotiations are held at Respondent's premises, Colavito goes onto the shop floor to see

[2] The Certification of Representative issued on July 20, 1983.

[3] The evidence shows that the contractual wage rate for Respondent's employees is as much as 50 percent lower than for employees in the industry generally. Therefore, the rate of Respondent's contributions to the funds as a percentage of wages paid to its employees is higher than the rate of contributions of other employers in the industry.

the unit members with Steve Degliuomini's permission. In fact Degliuomini himself testified that he permits union agents to go into the shop to speak to the employees. There is no evidence that Respondent ever inquires into the reason for the union representatives' conversations with the employees nor that Respondent limits the purposes for which the representatives speak to the employees on the shop floor.

Colavito testified that as a result of Respondent's failure to make fund contributions, the employees do not receive their full vacation benefits from the fund, the employees' pension statements do not reflect accurately all the credit they are entitled to and some medical benefits have been denied to employees. On occasion, employees of Respondent have come to Colavito asking about the condition of the funds maintained in their behalf and asking about their medical payments and inaccurate pension statements. These employees include Frank Mano, Steve Guisseppi or Guillermo, and Chero.

Colavito testified that Respondent's delinquencies to the funds were apparent by February 1987, and that when he spoke to office employees of Respondent about the situation, he was told that Respondent was not being paid by its contractors. Frank Hernandez, secretary-treasurer of the Union, testified to the same effect: whenever he asked about payments due to the funds, he was told that the Company was short of cash. The Union decided that it had to take action. It instituted the arbitrations, it sent the 10-day strike notice, and its lawyers drew up a confession of judgment for Respondent to execute. According to Hernandez, Respondent did not sign the confession of judgment when it was presented and this led the Union to take direct action to collect the money owed to the funds.

Hernandez and Anthony Rosaci, a member of the executive board of the Union, testified about what occurred on March 1, 1988, when the Union decided to visit Respondent's premises. Respondent's shop apparently opens about 7 a.m. and by 8 a.m. all the employees are at work. John Bell, vice president of the Union, arrived at the shop early, and, by 7:30 a.m., Hernandez, Rosaci, and Timothy Garner, recording secretary of the Union, arrived. Soon after this, Bell left. The union agents stood in the doorway of the shop speaking to the men about the delinquent fund payments. There were about four or five employees of Respondent present, and they and the union agents stood milling around the door, sometimes inside and sometimes outside the shop. The union agents explained to the employees that Respondent was very far behind in its fund payments and that the confession of judgment still had not been signed by Respondent. The Union told the employees that under the collective-bargaining agreement, they had the right to strike with pay to induce Respondent to remit contributions to the funds. According to Hernandez, the employees had a lot of questions. Some of the employees were aware of the problem concerning the funds, and the employees present that day agreed that they had to strike because the funds were important to them.

As the three union agents and the employees stood talking in the doorway of the shop about 8 a.m., Steve Degliuomini drove up and parked his car on the sidewalk in front of the shop. According to the union agents who testified in the instant proceeding, Degliuomini ''came running out of his car'' and shouted to the group, ''Who the fuck are you? What are the fuck you doing in my shop?'' Hernandez identified himself as a union official and gave Degliuomini a business card. Hernandez told Degliuomini that the Union did not have any conflict and just wanted to talk. He told Degliuomini that the men were going on strike due to the problems with the funds. By this time, the union agents were all on the sidewalk talking to Degliuomini and the employees were standing around with them. Degliuomini said he ''had had it with the Union,'' then to his employees he said, ''Do what you want to do. You guys want to go on strike, either come in or go out. I can replace you. I can close the god damn door and put a lock on it. What the fuck, I'll close the place down.'' He continued in this vein, asking the employees, ''What are you going to do? You going to go inside to work or go outside with them? I don't need any of you. I can replace all of you; If you don't want to work, get the hell out.''

To the union agents, Degliuomini said, ''Stay out of my shop. You go into my shop, I'm going to kick your ass. If I ever see you in this shop again, I'll kick your ass. I don't want you in the shop again.''

By this time, the employees began to stray back to work inside the shop, and employee Frank Mano left, announcing that he has going home.

The union agents were undecided as to their course of action. At first they began taking strike placards out of the trunk of a car, but then they replaced them and went to a nearby coffeeshop to talk over the situation. After a while, the union agents returned to the shop where they saw Pat Degliuomini, the brother of Steve Degliuomini, outside. Hernandez told Pat Degliuomini what had occurred. Degliuomini said that they should send Mano back to work, and the union agents agreed that they would go see Mano and tell him to return to work.[4] Hernandez spoke to Pat Degliuomini about the problem with delinquencies in payments to the funds, and the latter said that Colavito should call him to discuss the matter.[5]

Steve Degliuomini denied the union agents' version of the events of March 1. However, I credit the testimony of Hernandez and Rosaci, and I shall not rely on Degliuomini's testimony.

I note that since this incident, the Union has not been denied access and has visited the premises on several occasions.

D. *Discussion and Conclusions*

Respondent maintained in its opening statement that it did not repudiate the collective-bargaining agreement and that the failure to make contributions to the funds ''is an arbitrable issue, involving a grievance or dispute between the employer and the union.'' Pointing out that Respondent had attended some of the arbitrations held as a result of its failure to make the contributions, Respondent stated, ''that is a grievable and arbitrable issue, that was being handled through the defined processes of that collective bargaining agreement.'' Denying that it had violated the access provisions of the collective-bargaining agreement, Respondent ar-

[4] The Union did not want Mano to be isolated by being the only employee to stay away from work.

[5] Eventually, Respondent executed the confession of judgment, but it had to be changed from the form originally presented for signature because the passage of time had caused more money to be owing to the funds.

gued in its opening statement that the alleged denial of access was arbitrable under the contract and that the Union had filed no grievance following the incident. Respondent's opening statement concluded, ''the two issues really . . . were at most, grievable issues, which were handled and could have been handled through the grievance and arbitration process.'' It is clear, therefore, that Respondent put the General Counsel fully on notice at the commencement of the hearing herein that it was relying on the doctrine of deferral to arbitration as a defense to the complaint.

1. Fund contributions

General Counsel urges that the failure to make contributions to the funds violated the Act in that it amounted to a unilateral change in the terms of the collective-bargaining agreement both during the term of the contract and after it expired without notice to and bargaining with the Union. General Counsel argues that Respondent's actions undermined the Union and destroyed its majority status and thereby served as a repudiation of the collective-bargaining agreement. General Counsel's brief states, ''This attempt to undermine Local 455 was further evidenced in the RM petition filed by the Employer on April 26, 1988, in Case No. 29–RM–762, which was later dismissed by the Region.'' The brief concludes, ''Considering the unheeded arbitration awards; the signed, but still uncomplied with, Confession of Judgment; and the dismissed RM petition, it can be concluded that the Employer, in bad faith, caused a repudiation of the collective bargaining agreement and violated Section 8(a)(5) of the Act.''

General Counsel cites *Willis Electric*, 269 NLRB 1145 (1984) (employer violated the Act by sending a letter terminating its collective-bargaining agreement with the union before the expiration date); *Emsings Supermarket*, 284 NLRB 302 (1987) (employer violated the Act by discontinuing payments to fund, discontinuing payments to employees for vacations and by failing to give union notice of intention to close operations); *Wer-Coy Fabrication Co.*, 268 NLRB 907 (1984) (employer violated the Act after stating that he wished to be relieved of the contract by ceasing to make reports and payments to fringe benefit funds, ceasing to refer new employees to the union, not adhering to the contract in making job assignments and refusing an audit of his payroll records); *Pacific Sun*, 274 NLRB 1230, 1250 (1985) (employer violated the Act by sending written notice terminating collective-bargaining agreement and then making unilateral changes without negotiating and by withdrawing recognition from the union); and *NLRB v. Katz*, 369 U.S. 736 (1962). I note that none of these cases presented an issue of deferral to a contractual arbitration procedure.

Respondent's argument, in essence, is that it has participated in the arbitration procedure, signed the confession of judgment, and has sent contributions whenever it could afford to do so. As stated above, I find that there is no evidence in the record to show just what Respondent could afford to pay, and I am not satisfied that Respondent has shown that it had insufficient funds to meet its obligations to the funds. However, that is not dispositive of the issues. The evidence does not show that Respondent has refused to abide by any other provisions of the collective-bargaining agreement in a consistent and repeated manner. Respondent has not withdrawn recognition from the Union nor has it taken any action which could fairly be interpreted as a repudiation of the contract.

I conclude that the issue of Respondent's failure to make contributions to the funds should be deferred to the arbitration process chosen by the parties in their collective-bargaining agreement. The arbitration awards were introduced into evidence by General Counsel. The arbitration proceedings appear to have been fair and regular, all parties have agreed to be bound, and the decision of the arbitrator is not clearly repugnant to the purposes and policies of the Act. *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955). The contractual issue parallels the unfair labor practice issue—the failure to make contributions to the funds—and the arbitrator was presented with the relevant facts. Finally, the General Counsel has not shown that the standards for deferral have not been met. *Olin Corp.*, 268 NLRB 573 (1984). I note that the Board has held that a Respondent's failure immediately to comply with the award is insufficient reason to decline to defer to an arbitration award. *Malrite of Wisconsin*, 198 NLRB 241 (1972), enfd. in relevant part 494 F.2d 1136 (D.C. Cir. 1974).

2. Denial of access and threats

General Counsel contends that Respondent violated the Act by denying union representatives access to its facility in that access has been provided for by the collective-bargaining agreement and has been established by past practice between the parties. General Counsel further contends that Steve Degliuomini unlawfully threatened the union representatives with bodily harm in front of the employees. Finally, General Counsel argues that Respondent violated the Act when it threatened to close the shop if the employees engaged in a strike protected by the collective-bargaining agreement.

Respondent urges that it did not deny access to the representatives because the provisions requiring access pursuant to the collective-bargaining agreement had not been met. Respondent contends that the employees were conducting an illegal sitdown strike to cause Respondent to sign the confession of judgment. Respondent argues that the evidence does not show that Degliuomini threatened the union agents, but rather that the agents threatened Respondent by storming its facility. Finally, Respondent denies that it threatened its employees with plant closure.

As I stated above, I credit the testimony of General Counsel's witnesses concerning the events of March 1, 1988, and I do not credit Respondent's denials. Thus, I find that the Union had received questions and complaints from employees of Respondent about their benefits in light of Respondent's failure to make contributions to the funds, and that Respondent continued its failure to make contributions even though it had been ordered to do so in several arbitration awards. As part of the Union's attempts to obtain the proper contributions, it sought the signature of an officer of Respondent on a confession of judgment. On March l, 1988, union agents went to the shop to talk to the employees about the fund contributions and to induce them to strike to obtain Respondent's compliance with the arbitration awards and the collective-bargaining agreement. The employees had questions about the funds and stood talking to the union agents. When Steve Degliuomini arrived at the shop, the employees were talking to three union representatives in the doorway of the shop. The union agents made no threat to Degliuomini,

but he emerged from his car cursing and threatening to close the plant down and put a lock on the door, threatening to kick the union agents if he ever saw them again in the shop and telling the Union to stay out of his shop.

In its opening statement at the hearing, Respondent argued that all the issues raised by the complaint could be deferred to arbitration. Although Respondent's brief does not argue that the denial of access should be deferred to arbitration, I shall nevertheless consider that question. The denial of access took place during an incident when Respondent also threatened the union agents with bodily harm and threatened to close the plant. The entire incident is a unified transaction involving identical issues of credibility and interpretation. The issue of denial of access is intertwined with the issues concerning threat of bodily harm and plant closing. A reading of the collective-bargaining agreement does not reveal any basis for deferring the threats of bodily harm and plant closing to arbitration. I find that it would be inappropriate to defer the breach of the access clause to the arbitration process of the collective-bargaining agreement. Deferral is inappropriate where alleged violations that cannot be deferred to arbitration are intertwined with alleged violations that may be deferred. *International Harvester Co*., 271 NLRB 647 (1984).

The plant visitation clause of the collective-bargaining agreement quoted above specifies that union agents may enter the shop when ''employees are working.'' Respondent urges that this means the men must actually be bending over their tasks for the union agents to be permitted to enter the premises. Under Respondent's interpretation of the clause, if the employees pause to talk to their representatives they are not working and the union agents must leave. To state this proposition is to realize that it is false. Manifestly, once the union representatives enter the premises to perform their lawful functions, the employees must be permitted to talk to them or the whole purpose of the visitation clause would be nullified. I find that the purpose of the phrase ''at any time during which any employees are working'' is to establish the Union's right to enter the shop during woring hours while unit members are on the premises. Respondent urges that the phrase ''investigating complaints and/or working conditions'' must be given a narrow reading. The credible testimony shows that the Union had received questions and complaints about unit members' benefits in the funds and that the Union was discussing these matters with the employees on the morning of March l, 1988, when its agents were told to leave Respondent's premises. Thus, even under a narrow reading of the collective-bargaining agreement, the union representatives were properly on the shop premises. Moreover, the evidence shows that Respondent consistently permitted union agents to speak to employees on the shop floor both before and since March l, 1988, without requiring that the conversations be for the purpose of investigating complaints or working conditions. It is clear, especially from the testimony of Steve Degliuomini, that the custom and practice of the parties in their administration of the collective-bargaining agreement was that union representatives could have access to speak to the employees without regard to the purpose of their visit.

Further, the collective-bargaining agreement provides that if Respondent fails to make timely contributions to the funds, the Union may at any time after delivery of 10 days' written notice to Respondent ''strike and remove its members from the plant.'' When it was ordered to leave the shop, the Union was doing what Respondent had expressly agreed it could do, it was removing its members from the plant because Respondent had not made the contributions to the funds.[6] Contrary to Respondent's contentions, there is no evidence that the brief time the union agents spent in the shop doorway with the employees amounted to a sitdown strike.

I conclude that under the contract as it had been administered by the Union and Respondent, the union representatives had the right to be on the premises on March l, 1988, when they were ordered to leave and told never to come back to the shop again. Thus, I find that Respondent violated Section 8(a)(1) and (5) by denying access to the Union. *R. C. Cobb, Inc*., 231 NLRB 99, 104 (1977); *Tom's Ford*, 253 NLRB 888, 893 (1980).

The credible evidence clearly establishes that Steve Degliuomini threatened to kick the union representatives when they were at the shop on March l, 1988, talking to the employees. Contrary to Respondent's argument that the Union stormed the shop and that its presence was intimidating, I find that the union agents at all times conducted themselves in a peaceful and proper manner. The only threats shown to have been made on March l, 1988, were made by Respondent's president.[7] I find that Respondent violated Section 8(a)(1) of the Act by threatening union representatives with bodily harm in the presence of employees. *Marchese Metal*, 270 NLRB 293, 296 (1984).

The credible evidence establishes that when the union agents told Steve Degliuomini on March 1, 1988, that the employees were going to strike due to the problem with the funds, Degliuomini said that if the employees wanted to go on strike he could put a lock on the door and ''I'll close the place down.'' The collective-bargaining agreement provides that if Respondent is delinquent in its contributions to the funds, the Union may send a 10-day strike notice and at any time thereafter without further notice the employees may go out on strike. The evidence shows that the Union sent the required notice and that thereafter Respondent continued delinquent in its contributions to the funds. On March l, 1988, the employees had the right under the collective-bargaining agreement to strike the Respondent. The strike was precipitated by Respondent's failure not only to make the contributions but also to execute the confession of judgment pursuant to a number of arbitration awards that had ordered it to make the overdue contributions. The confession of judgment was the means whereby the Union sought to enforce the arbitration awards and assure that the funds would be paid. When Respondent threatened to close the plant if the employees exercised their rights under the collective-bargaining agreement, it violated Section 8(a)(1) of the Act.

[6] Respondent attempts to draw a distinction between striking to ensure payment to the funds and striking to obtain Respondent's signature to the confession of judgment. The Union had obtained arbitration awards entitling it to the delinquent contributions and it required Respondent's signature to the confession to pursue its legal remedies further. Thus the confession of judgment was a part of the enforcement mechanism to effect payments to the funds.

[7] Respondent's brief insinuates that there was something improper in the presence of three, and for a time, four union agents. In view of the Union's previous experience with Respondent, it may have felt that there was safety in numbers. See *15th Avenue Iron Works*, 279 NLRB 643, 654 (1986).

CONCLUSIONS OF LAW

l. The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time production and maintenance employees including installer employees employed at the Employer's 1676 61st Street, Brooklyn, New York facility, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

2. At all times material, the Union has been the exclusive representative of all employees within the appropriate unit described above for purposes of collective bargaining within the meaning of Section 9(a) of the Act.

3. By denying union agents access to its facility, Respondent violated Section 8(a)(5) and (1) of the Act.

4. By threatening union agents with bodily harm in the presence of its employees and threatening to close its facility if the employees exercise their right to strike under the collective-bargaining agreement, Respondent violated Section 8(a)(1) of the Act.

5. General Counsel has failed to prove that any other violations of the Act were committed.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

[Recommended Order omitted from publication.]